ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers	CC Docket No. 92-26

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

Frank W. Krogh
Donald J. Elardo
1801 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 887-2372

Its Attorneys

Dated: May 11, 1992

Table of Contents

Summary

The initial comments reflect a relatively broad consensus opposing several of the Commission's proposals to shorten filing deadlines and restrict discovery in formal complaint proceedings and supporting some of the Commission's other proposals, most notably, the confidentiality rules. Several other parties echo MCI's concern that in choosing to sacrifice fairness for speed, the Commission will end up serving neither goal. For the most part, the Commission cannot expect its proposals -- including those that should be adopted -- to reduce delays in the formal complaint process significantly.

Most of the commenters agree that several of the proposed pleading modifications would be a mistake. The proposed shortening of defendant's time to answer, the requirement that a summary judgment motion be served with defendant's answer and the imposition of a rigid, uniform format on all briefs would increase the parties' burdens and reduce the effectiveness of the complaint process. The comments reflect similar criticisms of the proposed elimination of replies to affirmative defenses in ambiguously defined circumstances. There were no substantial justifications for any of these proposals advanced by any of the parties. One suggestion that promises to save significantly more time than the Commission's proposed pleading modifications is Allnet's proposal to allow complainants to start the pleading cycle clock running by serving their own complaints directly on

the defendants. Cases could get started earlier, with no additional burdens on the parties.

Several parties also share MCI's concern that some of the proposed discovery modifications would so restrict discovery as to weaken the complaint remedy as an effective check on dominant carrier rates. The same deregulatory policies that have caused the Commission to rely more heavily on the complaint process to enforce the Communications Act have also reduced the availability of the dominant carrier data upon which complaints must be predicated. It is therefore essential that discovery rights not be compromised.

Thus, most commenters opposed the suggestion in the Notice that discovery not be permitted except by order of the Commission in a particular case. There was also substantial opposition to the proposed shortening of the deadline for serving initial interrogatories and the even more drastic shortening of the time to serve any motions for additional discovery and motions to compel discovery. Opinion was almost unanimously against the elimination of relevance objections and the proposal to treat a failure to answer a discovery request as an admission.

On the other hand, opinion was almost as solidly in favor of the proposed confidentiality rules, with suggested alterations. Generally, however, whatever delays might inhere in the complaint process would be more effectively addressed by more vigorous supervision of the pleading and discovery stages through the use of status conferences and sanctions for bad faith or dilatory tactics, not by adoption of the proposals in the Notice.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers	)	CC Docket No. 92-26

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, submits these reply comments concerning the Commission's proposals to modify its formal complaint procedures. A review of the initial comments in this proceeding reveals an unusually broad consensus supporting some of the Commission's proposals, such as the proposed confidentiality rules, and criticizing others, such as some of the proposed shortened deadlines. In most cases, that consensus view is also buttressed by better-reasoned arguments.

In particular, various parties' explanations of the unnecessary, unreasonable and counterproductive burdens that would be imposed by some of the proposals to shorten deadlines or restrict discovery, and the concomitant increased delays and threats to parties' due process rights caused thereby, are especially illuminating.[1/] As one party cogently puts it: "Efficiency does not ... equate with speed, and speed is no

---

[1/] See, e.g., US West Comments at 2; Hirrel Comments at 1-4; FCBA Comments at 2. The initial comments will be cited in this abbreviated manner throughout.

substitute for justice."[2/] That would make a perfect epitaph for several of the Commission's proposals, which would impair the fair resolution of complaints and waste more time than they could possibly save. The initial comments thus provide a relatively clear path for the Commission to follow in deciding whether to revise or leave standing each of its formal complaint procedural rules.

The initial comments are also fairly unanimous that these proposed procedural changes, including those that the commenters agree should be made, will not have much of an impact on the problem that the Commission is ostensibly attempting to address in this proceeding, namely the delays in resolving formal complaints. The comments from a wide variety of parties reflect a common experience, namely that the most extensive delays in complaint proceedings occur after the pleadings and discovery phases have been completed.[3/] None of the proposals in the Notice[4/] can be expected to affect those delays, and such delays therefore should not be used as a "basis for restricting the procedural rights of parties in complaint proceedings."[5/]

[2/] NATA Comments at 2. See also, cases cited in Hirrel Comments at 2.

[3/] See, e.g., US West Comments at 2; AT&T Comments at 2; FCBA Comments at 3.

[4/] Notice of Proposed Rulemaking, FCC 92-59 (released March 12, 1992).

[5/] Hirrel Comments at 3.

Nevertheless, there are a number of proposals that deserve adoption on their own merits, independently of whatever impact they may have on the speed of ultimate resolution of complaint proceedings. The Commission should therefore pursue those proposals, albeit with reduced expectations. Once those modifications are put into place, however, the Commission should turn its attention to the main causes of delay in formal complaint proceedings in an effort to clear up its current backlog of such cases.

Most of the Proposed Pleading Modifications Should be Rejected

A large majority of the parties agree that the proposed shortening of defendants' time to answer, from 30 to 20 days, would be extremely ill-advised. As they explain, a period of 20 days and, often, even 30 days, is not enough time to retain counsel (where necessary), investigate the facts, conduct file searches and legal research, draft an answer and circulate it to relevant client personnel. Shortening defendants' time to answer will create unreasonable pressures to cut corners, resulting in more motions for extension or inadequate, ill-considered answers, necessitating subsequent amendments.[6/] The 20 days allowed in the Federal Rules of Civil Procedure for answering is not an apt analogy, since: (a) the Federal Rules, unlike the Commission's

---

[6/] See, e.g., FCBA Comments at 3-4; BellSouth Comments at 2-3; Nynex Comments at 2-3; Hirrel Comments at 4-5; Centel Comments at 2-4; GTE Comments at 2; SWB Comments at 1-2; United Video, et al. Comments at 4-5; US West Comments at 3.

Rules, provide for notice pleading, which allows for sketchier answers; and (b) extensions and amendments to pleadings are liberally granted in the federal courts, contrary to the Commission's practice.[7/]

None of those parties who support the proposed reduction offers any reasons for its views, other than the casual conclusory reaction that such reduction would not be burdensome or restrictive.[8/] It has therefore not been demonstrated that this proposal will accomplish any of the Commission's goals; rather, it will generate more delays and should clearly be rejected.

Similarly, the weight of the well-reasoned comments echoes MCI's view that it would defeat the underlying purpose of summary judgment motions to require that such motions be filed with the defendant's answer except where the defendant could demonstrate that the motion was based on information learned subsequently. The whole point of such motions is to apply the results of discovery and other factual development to the dispositive issues raised by the pleadings so as to resolve some or all of those issues without the need for further proceedings. It would

---

[7/] See Hirrel Comments at 5; BellSouth Comments at 2; United Video et al. Comments at 4; Nynex Comments at 2-3; GTE Comments at 2.

[8/] See, e.g., Ameritech Comments at 5; AT&T Comments at 3; Williams Comments at 1-2; Allnet Comments, Attachments A at iv; Bell Atlantic Comments at 1 & n.4.

frustrate the purpose of summary judgment to presumptively disallow its use at the very point in the proceeding (during discovery, subsequent to the pleadings), when it typically becomes most appropriate and likely to be useful. This proposal thus would be counterproductive, in that the resulting chilling of the use of summary judgment motions would tend to lengthen complaint proceedings.[9/]

It is also not clear whether there is any similar deadline for complainants moving for summary judgment. If not, there has been no explanation for the difference in treatment between complainants and defendants. Summary judgment motions accordingly should be explicitly authorized at any time in a formal complaint proceeding, just as in the Federal Rules.[10/]

On a related issue, MCI believes that United Video, et al. make a good case for permitting the filing of a motion to make the complaint more definite and certain or of a motion to dismiss

---

[9/] See United Video et al. Comments at 6-7; Pacific Bell Comments at 1-2; GTE Comments at 2-3. Pacific Bell proposes that summary judgment motions be permitted up to 30 days after answers to interrogatories are due. Pacific Bell Comments at 2. Even assuming that Pacific Bell intended a deadline of 30 days after answers to all interrogatories are actually received, which would make more sense, there is still no good reason to limit the use of a procedure that can only serve to lighten the Commission's burden by eliminating issues or even the entire proceeding.

[10/] See Fed. R. Civ. P. 56. As US West suggests, the Commission should explicitly authorize motions for summary judgment and state that they are to be governed by the principles typically applied to such motions in the federal courts. See US West Comments at 6.

prior to answering.[11] If a complaint is vague, fails to state a claim or is otherwise facially defective, there is no reason to require an answer and to continue the proceeding any longer until a proper complaint can be filed, if possible. Defendant's time to answer could be tolled until the Commission rules on the motion.

At the very least, this two-step procedure should continue to be used for motions to make the complaint more definite and certain, if not for other dispositive motions. As the Federal Communications Bar Association (FCBA) and United Video, et al. point out, such motions prior to filing the answer actually expedite the process by ensuring more precise allegations and a clear delineation of the issues. Such motions could be required within a short period of time after service of the complaint -- shorter than the time to answer -- which would reduce any delay that might result from the filing of such motions. If the motion were granted, the complainant could be given a short time in which to refile, and the defendant given a short time to answer the refiled complaint.[12]

---

[11] United Video, et al. Comments at 4-5.

[12] FCBA Comments at 7-8; United Video, et al. Comments at 5-6. The FCBA, at 8, omits the refiling of the complaint from its discussion of this procedure, but that is clearly what is intended where a motion to make more definite and certain is granted.

The overwhelming weight of considered opinion in the initial comments also favors continuation of the current approach to briefs in complaint proceedings and the rejection of the proposed timing, length and format limitations that would straitjacket the use of briefs to assist the staff in the resolution of complaint cases. As several parties point out, in those cases that are, in the opinion of the staff, sufficiently complex to require briefing, it would make no sense to impose artificially low page limits or artificially short deadlines.[13/]

It would also be irrational to make distinctions in such restrictions on the basis of whether or not discovery had been conducted, or to permit reply briefs only where there had been discovery. Reply briefs are necessary to respond to the other party's contentions, irrespective of discovery.[14/] Otherwise, all of the questions raised by each party as to the other's position remain unsettled, and the staff remains without sufficient guidance.[15/] Even those parties not opposed to the proposed limits on briefs oppose the elimination of reply briefs and/or any distinctions based on the presence or absence of

---

[13/] US West Comments at 3-4; Hirrel Comments at 6; United Video, et al. Comments at 8-9.

[14/] In fact, as Pacific Bell points out, at 6-7, reply briefs may be even more necessary where there has been no discovery, since the parties know less about each other's case.

[15/] See United Video, et al. Comments at 8; BellSouth Comments at 3; Hirrel Comments at 6-7. See also, Nynex Comments at 3-4.

discovery.[16] Simultaneous briefs, another requirement in the proposal, also might not be as useful as consecutive briefs in a particular case.[17] As MCI, US West and other parties suggest, these scheduling and format issues are all matters that are ideally suited for determination at a status conference, as is done now.[18] This is clearly one of several aspects of the current rules that are not broken and should not be "fixed."

Opinion was more divided concerning the proposal to eliminate replies to answers in cases other than where the answer "presents affirmative defenses that are factually different from any denials also contained in the answer."[19] Those comments that reflect more careful analysis of this issue, however, point out that the proposed criterion of an affirmative defense that is "factually different from" the denials in the answer is too ambiguous and would lead to continual disputes over what constitutes a proper reply.[20] Some parties also point out that the vagueness of that criterion would create a tendency to reply to all affirmative defenses, so as not to miss any that might

---

[16] BellSouth Comments at 3; Ameritech Comments at 5-6; NATA Comments at 11.

[17] FCBA Comments at 13-14.

[18] US West Comments at 4; Hirrel Comments at 6; United Video, et al. Comments at 9.

[19] Notice at ¶ 10.

[20] See, e.g., Sprint Comments at 3-4; Allnet Comments, Attachment A at v.

ultimately be construed to be factually different from the denials in the answer.[21]

Some parties support the proposal, but generally without any explanation, other than the conclusory statement that it would reduce unnecessary pleadings.[22] Ameritech repeats the argument in the Notice that elimination of most replies would force complainants to prepare properly supported complaints.[23] If there is a concern about superfluous replies, however, the appropriate remedy is stringent sanctions. For example, one commenter suggests that the Commission could refuse to consider a reply consisting largely of material that was or should have been presented in the complaint.[24] That should be a sufficient deterrent to superfluous replies without doing away with necessary replies.

Opinion is also evenly divided on the proposal to eliminate replies to oppositions to motions. Some commenters believe that the elimination of replies will reduce unnecessary filings and abusive "gamesmanship" by forcing movants to disclose all of their arguments in their initial filings, rather than holding

---

[21] Allnet Comments, Attachment A at v; FCBA Comments at 6.

[22] See, e.g, United Video, et al. Comments at 6; Bell Atlantic Comments at 1; US West Comments at 5; Nynex Comments at 2; Williams Comments at 2.

[23] Ameritech Comments at 5.

[24] Hirrel Comments at 7-8.

some back for reply. They argue that the issues in most motions are limited and straightforward and do not require a reply.[25/]

Others take the view, however, that the elimination of replies will invite equivalent abuses by parties filing oppositions to motions, knowing that they will not be challenged. Replies are necessary to rebut arguments, new facts or misstatements presented in the opposition to the motion, and such rebuttal is not possible in the initial motion. Those parties also point out that since movants bear the burden of demonstrating the need for the relief they seek, they should have the last word.[26/] Moreover, the five days permitted for replies does not cause any significant delay.[27/] If the right to reply is sometimes abused, the remedy is not to "throw[] out the baby with the bathwater,"[28/] but rather to limit replies by permitting them to address only matters raised in the opposition[29/] or by imposing effective sanctions, such as refusing to consider a reply raising matters that were or should have been raised in the original motion.[30/]

[25/] See FCBA Comments at 6-7. See also, Nynex Comments at 2; Allnet Comments at 2.

[26/] See Hirrel Comments at 6-8; United Video, et al. Comments at 7-8; Ameritech Comments at 5-6.

[27/] Pacific Bell Comments at 2.

[28/] Hirrel Comments at 7.

[29/] Pacific Bell Comments at 2-3.

[30/] Hirrel Comments at 7-8.

One procedural innovation that would actually eliminate a significant delay in the opening stages of the formal complaint process without burdening the parties with artificially short deadlines or restricting pleading opportunities is Allnet's proposal to permit complainants to serve their complaints directly on the defendants. By allowing such self-service, using a file number obtained from the Commission for reference, defendants would receive complaints weeks earlier than they do now, allowing the pleading cycle to begin that much sooner.[31/] That time saving would roughly equal the total time that the Notice proposes to cut out of the pleading cycle. Most of the pleading modifications proposed in the Notice should be jettisoned, as discussed above, and Allnet's self-service proposal substituted therefor.

As might have been expected, some of the BOCs have taken this opportunity to try to restrict the statutory complaint remedy. Southwestern Bell (SWB) proposes that any complaint alleging unreasonably high rates or earnings must be dismissed if the rates comply with the price cap rules and the sharing mechanism has been applied properly.[32/] As the Commission has held, however, that is not the necessary import of the price cap rules. A particular rate may still be found unreasonable under Section 201(b) of the Communications Act, even if it complies

---

[31/] Allnet Comments, Attachment A at iii.

[32/] SWB Comments at 2.

with the price cap rules.[33] In a similar vein, US West proposes the dismissal of complaints not supported by sufficient facts.[34] The Commission must be careful, however, not to dismiss complaint cases simply because the complainant lacks facts in the defendant's possession concerning the reasonableness of defendant's rates. A complaint must be allowed to proceed if, assuming the truth of its allegations, it states a claim. It would be the ultimate "Catch-22" if the relative absence of public data concerning the reasonableness of dominant carriers' rates, in the wake of the Commission's relaxed regulation of such carriers, were allowed to become an excuse to dismiss the only effective remaining remedy for their unreasonable rates.[35]

Some of the Proposed Discovery Modifications Would Restrict Discovery Unreasonably and Should be Rejected

Several parties share MCI's concern that a number of the Commission's proposed "reforms" of the discovery timetable and mechanisms would put such a burden on parties seeking crucial carrier data that the complaint remedy would be greatly weakened

---

[33] Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 2637, 2733 at ¶ 206-07 (1991), appeal docketed sub nom. Public Service Comm. v. FCC, No. 91-1279 and consolidated cases (D.C. Cir. June 14, 1991).

[34] US West Comments at 5.

[35] Nynex, at 7, proposes that discovery be held in abeyance pending the resolution of any dispositive motions. This might be a useful idea as long as the Commission makes clear that a complaint could not be dismissed simply because the complainant lacked some facts in the sole possession of defendant that complainant was seeking in discovery.

and perhaps eviscerated. As the North American Telecommunications Association (NATA) and other parties have observed, the recent deregulatory trend has caused the Commission to place increasing reliance on the complaint process to enforce the Communications Act and its rules.[36/] Complainants, however, do not have access to all of the facts they need from carriers to file adequate complaints meeting the Commission's rules. Access to such data through discovery is therefore essential if the Act is to be enforced.[37/] Several of the proposed revisions would hinder the complainant's ability to acquire sufficient facts, leaving the complaint remedy worthless.[38/]

For example, elimination of any and all discovery unless specifically ordered by the staff, as proposed in footnote 9 of the Notice, would be "intolerable," in NATA's words.[39/] It is unreasonable to expect a complainant to have all the facts needed to establish a prima facie case at the time the complaint is filed, especially a case involving the reasonableness of carrier rates. A presumption that there generally should be no discovery thus would be irrational.[40/]

[36/] NATA Comments at 2; Hirrel Comments at 8.

[37/] Hirrel Comments at 8-9.

[38/] NATA Comments at 2-6.

[39/] Id. at 6.

[40/] See also, FCBA Comments at 8-9; DC PSC Comments at 5 n.9; Continental Mobile Comments at 4-5; Williams Comments at 2.

(continued...)

There is also significant opposition to the drastic shortening of the deadline for serving interrogatories, to 20 days after the answer is due, and the restrictive requirement that motions requesting permission for any additional discovery be made in the same shortened time frame. The shortened period would not allow for the preparation of narrowly focused interrogatories, which would result in more discovery disputes[41] -- particularly in the case of defendants, who must "catch up" to the complainants' prior level of preparation.[42]

Moreover, since the need for additional discovery typically does not become clear until the responses to the initial interrogatories are reviewed, it would be irrational to require that all follow-up discovery motions be filed within the time allowed for the filing of the initial interrogatories.[43] Such a requirement would induce parties to move for wide-ranging

---

[40](...continued)
Bell Atlantic, at 2, supports the proposed presumption against any discovery, arguing that complaint cases frequently feature liability questions that can be resolved without discovery. If that is the case, however, unnecessary discovery can be forestalled by other means, such as the use of bifurcated proceedings or holding discovery in abeyance until dispositive motions are decided. See discussion, infra.

[41] Nynex Comments at 4-5. True to form, two of the BOCs, SWB, at 3, and Bell Atlantic, at 1, endorse the shortening of the time to file interrogatories and other discovery requests, without providing any explanation.

[42] See FCBA Comments at 10.

[43] See NATA Comments at 8; DC PSC Comments at 6-7; United Video, et al. Comments at 10-11.

additional discovery of unknown benefit at the deadline in order not to be foreclosed from follow-up discovery that they could only determine was actually necessary later.[44/] The current version of Section 1.730 of the Rules, providing for motions to permit follow-up discovery 30 days after the responses to the initial interrogatories are filed or 30 days after the reply is due, whichever is later, thus should be kept in place.

The parties commenting on the proposal to reduce the time in which to move to compel discovery oppose it for reasons similar to MCI's rationale. Five days is simply not enough time to review responses to discovery, draft a motion to compel and obtain client review. Such impossible deadlines on motions to compel will only result in more ill-considered motions to compel and/or requests for extension, thus resulting in further delays.[45/]

BellSouth agrees with MCI that 20 days is too short a period of time to respond to interrogatories. The increased burden caused by the shortening of the time to respond would induce parties to object instead, whether or not such objections were reasonable, simply to buy more time to conduct whatever file

---

[44/] United Video, et al. Comments at 10-11.

[45/] See Nynex Comments at 6; DC PSC Comments at 5-6.

searches, interviews and research were necessary to answer the interrogatories.[46/]

Three of the BOCs also raise a valid concern about an anomaly in the proposed requirements concerning responses to discovery. Objections to the "breadth of discovery" would have to be made within 10 days of service of the discovery, whereas other objections to the discovery could be served later, when the response was due. It would be inefficient and confusing to serve one set of objections in 10 days and another set later, with whatever answers to the interrogatories were being served. The earlier service of objections as to breadth would not speed up the process, since the party serving the discovery could not determine what steps to take in reaction to the "breadth" objections until he had seen all of the other objections and responses to the interrogatories.[47/]

Perhaps no proposal in the Notice is as universally condemned as the proposed treatment of relevance objections. Precluding relevance objections, in most parties' opinions, would lead to predictable discovery abuses, i.e., "fishing expeditions." Moreover, opinion is virtually unanimous that the proposal to treat unanswered discovery requests, objected to on

---

[46/] BellSouth Comments at 4-5.

[47/] Pacific Bell Comments at 4-5; BellSouth Comments at 5-6; Nynex Comments at 5-6.

relevance grounds, as admissions would be unworkable, largely because it would be impossible to determine what fact should be considered admitted by the failure to answer a particular question. Such confusion would invite more disputes over discovery. The proposed treatment of unanswered discovery would quickly lead to the serving of improper discovery requests, framed to elicit admissions rather than facts. Finally, parties faced with such a draconian sanction would be forced to respond fully to any interrogatories, no matter how irrelevant, thereby burdening the record and complicating the decisional process.[48/]

If the Commission wants to keep discovery from getting bogged down with relevance and other objections, the staff should exercise supervision over the discovery process by the use of status conferences.[49/] Indeed, a more frequent use of status conferences to manage all phases of formal complaint proceedings would solve whatever delays may inhere in the complaint procedures, while ensuring the fair resolution of cases.[50/]

[48/] FCBA Comments at 10-12; United Video, et al. Comments at 13-14; Sprint Comments at 4; GTE Comments at 3-4; Ameritech Comments at 9; Pacific Bell Comments at 5; AT&T Comments at 5-7; US West Comments at 8-11; Allnet Comments, Appendix A at ix; Bell Atlantic Comments at 3-4; NATA Comments at 9-10; Hirrel Comments at 9-10; BellSouth Comments at 8-9; Nynex Comments at 7-10. Nynex points out that the proposal to preclude relevance objections is also inconsistent with the proposed rule providing for objections to the "breadth" of discovery, which inevitably involves issues of relevance. Id. at 9-10.

[49/] See Sprint Comments at 5-7.

[50/] NATA Comments at 11-12.

Other proposals by the parties include a rule along the lines of the pretrial order procedure in the Federal Rules, as proposed by US West,[51] and a provision along the lines of the sanctions in Fed. R. Civ. P. 37(a)(4), which requires a party objecting to discovery without substantial justification to pay the costs of the other party's successful motion to compel.[52] Another approach might be to refer the supervision of the discovery process to an Administrative Law Judge, as Ameritech suggests. No specific discovery rules or procedures would be necessary, since the ALJ would determine how discovery is to be conducted.[53] Any of these proposed solutions would be vastly preferable to the clumsy, unworkable device proposed in the notice to deal with relevance objections.[54]

---

[51] US West Comments at 12-14.

[52] See United Video, et al. Comments at 14-15. See also, Williams Comments at 4-5 & n.8 (party denying request for admission in bad faith should pay costs of establishing disputed facts).

[53] Ameritech Comments at 7-8. The determination as to whether a case involved factual issues might be accomplished by the use of requests for admissions early in the process. Id. at 7.

[54] Continental Mobile, at 3-4, supports the Commission's proposal, stating that even the most innocuous discovery requests typically are not satisfied until the party seeking discovery has moved to compel discovery over the opposing party's generic relevance objection. It is true that parties often abuse the relevance objection, but the discovery management proposals of other parties, discussed above, offer a much better solution to that problem than eliminating relevance objections altogether.

Some of the Proposed Discovery Modifications, Including The Proposed Confidentiality Rules, Should Be Adopted

Although there are some criticisms of the Commission's proposed confidentiality rules in the initial comments, most of the parties support them, with slight modifications. A large majority of the commenters agrees that the confidentiality rules really would expedite complaint proceedings and promote their fair resolution.[55] Some of the commenters have some useful suggestions about the proposal, which should also be adopted.[56]

Some of the parties argue that more restrictions should be established to safeguard the proprietary information at issue. For example, AT&T suggests that the Commission make it clear that in appropriate cases, access to the confidential data should be restricted in order to prevent marketing personnel and other similar employees from obtaining the data.[57] Allnet and United

---

[55] FCBA Comments at 12; Continental Mobile Comments at 3 n.5; United Video, et al. Comments at 16; Ameritech Comments at 9; Sprint Comments at 4; US West Comments at 11-12; NATA Comments at 10-11; Pacific Bell Comments at 6; Hirrel Comments at 9. See also, Allnet Comments, Attachment A at xi-xii.

[56] For example, if the Commission adopts its proposal to have both redacted and unredacted versions of briefs filed in cases involving confidential information, five extra days should be allowed for the submission of the redacted version of any brief. Redacting confidential information is a time-consuming process, which would interfere with the final preparation of a brief for filing. Since the Commission would be using the unredacted version in its review of the case, the extra five days for submission of the redacted version would not hold up the proceeding. See Hirrel Comments at 9. Ameritech also suggests that there should be remedies if the confidentiality rules are breached. See Ameritech Comments at 9.

[57] AT&T Comments at 4-5.

Video, et al. raise similar concerns, especially with regard to the use of the data. They request the addition of explicit provisions prohibiting the use of the data for any purpose other than for the individual complaint proceeding, and prohibiting the inclusion of the data in the public version of any filing.[58] All of these suggestions seem reasonable and should be incorporated in the confidentiality rules, subject to the concerns stated herein.

---

[58] Allnet Comments, Attachment A at xi-xii; United Video, et al. Comments at 16. Allnet suggests various modifications to the proposed Section 1.731 attached to the Notice to reflect these suggestions. See Allnet Comments, Attachment A at xi. Although MCI agrees with the thrust of Allnet's suggested modifications, there are anomalies that would need to be ironed out before they could be adopted. Allnet's proposed modification of subsection (b)(2) of Section 1.731 arguably would impose somewhat different burdens on in-house counsel and their support staff, as well as all other personnel possibly "directly involved" in the case, relative to the burdens imposed by subsection (b)(1) on all other counsel. Subsections (b)(1) and (b)(2) would have to be coordinated better so as not to require all in-house counsel and their support staff to be "named" by the party obtaining discovery of the confidential data, while apparently not imposing such a requirement on other counsel and support staff.

There should also be a similar clarification of the scope of the obligation imposed by Allnet's proposed modification to subsection 6, requiring all persons provided access to the data to sign a notarized statement affirming their understanding of the confidentiality rules. Attorneys and their support staff, for example, should not have to sign such statements. If the Commission adopts Allnet's proposed modification to subsection 6, the rule should be clarified to limit, insofar as practicable, the burdens imposed by the suggested notarized statement requirement. For example, no person should be required to sign multiple notarized statements. A single statement in a Commission-maintained master file should be sufficient.

Allnet also recommends a "sample non-disclosure agreement" in order to eliminate disputes over the contents thereof.[59] MCI believes, however, that the proposed rules are clear enough without a sample or model agreement. It is MCI's understanding that the Commission is in fact proposing general rules so that individual agreements or orders do not have to be issued in each complaint proceeding. Consistent with that intent, the Commission should not introduce unnecessary confusion by adding a sample agreement to supplement the rules. There will inevitably be inconsistencies between the rules and the terms of the agreement, leading to the types of disputes the Commission is attempting to forestall.

The only opponents of the proposed confidentiality rules are SWB and Bell Atlantic. Bell Atlantic argues that the proposed rules "might be too restrictive -- or not restrictive enough" in some situations that it does not disclose. Bell Atlantic also states that some information is "so sensitive" that it cannot be shared even under a confidentiality agreement, citing the current treatment of "SCIS" data in the ONA Proceeding.[60] Bell Atlantic concludes that the use of such confidentiality rules should be voluntary.[61]

---

[59] Allnet Comments, Attachment A at xii.

[60] Bell Atlantic Comments at 4-5 & n.12.

[61] Id. at 5.